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# Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 63.

CONNECTICUT RAILWAY AND LIGHTING COMPANY, PETITIONER,

*v.*

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, AS TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

## BRIEF OF ROBERT G. DODGE AND TALCOTT M. BANKS, JR., AMICI CURIAE.

ROBERT G. DODGE,
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TION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

*it Please the Court:*

e undersigned, counsel for Howard S. Palmer, James Loomis and Henry B. Sawyer, as Trustees of the Property of Old Colony Railroad Company, respectfully move Honorable Court for leave to file the accompanying f in this case as *amici curiae*.

ROBERT G. DODGE,
TALCOTT M. BANKS, Jr.,
Counsel for the TRUSTEES OF THE PROPERTY OF OLD COLONY RAILROAD COMPANY, as *Amici Curiae*.

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No. 63

CONNECTICUT RAILWAY AND LIGHTING COMPANY, PETITIONER,

*v.*

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## BRIEF OF ROBERT G. DODGE AND TALCOTT M. BANKS, JR., AMICI CURIAE.

### PRELIMINARY STATEMENT.

This brief is filed by counsel for the Trustees of the Property of Old Colony Railroad Company, whose petition for certiorari (October Term, 1938, No. 325) is pending, seeking a review of a decision of the Circuit Court of Appeals for the Second Circuit in the same reorganization proceedings out of which the case at bar arises. The question of the damages to be allowed a lessor whose lease is rejected under Section 77 of the Bankruptcy Act is presented in that case

as well as in the present case, and the decision of the prese case will have a vital bearing upon the rights of the pet tioners in No. 325.

Old Colony Railroad Company (hereinafter called "Ol Colony") in 1893 leased to The New York, New Haven an Hartford Railroad Company (hereinafter called "Ne Haven") for a term of ninety-nine years approximately 53 miles of railroad line, which thereafter constituted th eastern quarter of the New Haven system, including th main line between Boston and Providence and all its rail roads in southeastern Massachusetts. On October 23, 1935 New Haven reorganization proceedings were begun in th United States District Court for the District of Connecti cut under § 77, and in June, 1936, the trustees of its property disaffirmed the lease of Old Colony. Since it had no organ ization or equipment and could not resume independen operation, Old Colony was forced at once to file a petitio for its own reorganization under § 77 in the same court i connection with the New Haven proceedings. The Ne Haven trustees were appointed to serve also as trustees o the property of Old Colony, but the prosecution of Ol Colony's claim against the New Haven estate has bee handled throughout by special counsel appointed by th District Judge.

At the time the Old Colony claim was heard by the Dis trict Court its decision upon the similar claim of Connecti cut Railway and Lighting Company, involved in this case had already been rendered. In passing on the Old Colon claim the District Judge expressly followed his prior ruling and held the claim provable only to the extent of unpai rentals and other payments accrued under the lease to th date of final hearing, less the rental value of the propert for that time. Nothing was allowed as damages for th loss of all future rentals. From this decision the Ol Colony trustees appealed to the Circuit Court of Appeal

for the Second Circuit, but that court, bound by its earlier affirmance of the Connecticut Railway and Lighting Company decision upon appeal, left the ruling of the District Judge in this respect undisturbed (98 F. (2d) 670). The opinion of Judge Learned Hand contains an intimation, however, that the majority of the court as then constituted might have approved a more liberal rule if it had been free to do so.

While the present case and the Old Colony case both arise from the disaffirmance of a lease by the debtor, there are certain differences between the cases. The Connecticut Railway and Lighting Company is a trolley and bus line property which the owner was able to repossess and operate. The Old Colony, on the other hand, was a constituent part of the debtor's railroad system, and it has necessarily been operated since disaffirmance by the debtor's trustees at heavy losses to the owner. At the time of disaffirmance the Old Colony lease had fifty-six years to run, while the unexpired term of the Connecticut Railway and Lighting Company lease was over nine hundred years. At the hearing on the Old Colony claim there was a large amount of evidence of various kinds with respect to the future rental value of the property.

## Argument.

It is submitted that a lessor whose lease is rejected is entitled under § 77 to prove for its real damages, so far as those can be proved with sufficient definiteness, that the court below unjustifiably limited the provable damages, and indeed so construed § 77 as to render it repugnant to the Fifth Amendment.

## I.

***Under Section 77 a Lessor is entitled to prove a Claim for all Damages suffered from the Rejection of the Lease, so far as these can be proved with Sufficient Certainty, and the Limitation imposed by the Court Below is Unjustified.***

It seems clear that when Congress took the step in § 77 of providing that the reorganization should relieve the debtor of all further liabilities under a disaffirmed lease,[1] it intended also to give the lessor a claim truly representative of its actual loss. This was a fundamental change from the equity receivership practice, in which claims for future rent, for historical reasons, were not provable unless the lease contained an indemnity covenant, and were not dischargeable, but continued to harass the debtor. Congress, by abrogating the old rule, permitted the debtor to continue in business, thus avoiding the problems of foreclosure and sale, helping to expedite reorganization, and at the same time giving lessors more equitable treatment.

The court below held, and both parties in this case agree, that in § 77, as in § 77B, "the purpose is clearly to give a landlord a provable claim for injury due to the rejection of his lease, whether the instrument contains a covenant of indemnity or not."

*City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U.S. 433, 441.

[1] The provision in § 77, as amended (11 U.S.C. § 205, 49 Stat. 911, Aug. 27, 1935, c. 744), which effects this, is section (f). It provides that "The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor, pursuant to the plan, shall be free and clear of all claims of the debtor its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention."

is claim is, of course, for the real damage the lessor ffers, and to limit it arbitrarily by any technical or pro-dural rule would be contrary to the tenor of the statute, ich, as the District Judge said in this case, "has swept ay all the technicalities of the common law with respect the anticipatory breach of leases and of covenants for it" (R. 337).

The proper measure of damages for the claim of a lessor ose lease is disaffirmed has been established beyond dis-te. This Court has said:

> "The amount of the landlord's claim for the loss of his lease necessarily is the difference between the rental value of the remainder of the term and the rent reserved, both discounted to present worth" (City Bank case, 299 U.S. 433, 443).

ere is no express limitation to be found in the terms of 7. The only question at issue is whether some limiting le, other than the universal principle that any claim must proved with sufficient certainty, can be implied.

The District Judge introduced such a limitation by con-uing "actual" to mean "accrued" (R. 335). He ruled at the lessor could only prove for the sums which would ve come due under the lease, if it had remained in force, to the date of the hearing, granting leave to apply for a pplemental hearing later in the proceedings. This limita-n seems untenable for several reasons:

(1) It depends upon giving to the word "actual" a novel eaning, without judicial support, which Congress could t have intended. The normal significance of "actual mage or injury" is the real loss suffered, the difference tween the payments expected and the expense saved, as ntrasted with nominal, punitive or theoretical damage.

The phrase has been so used in statute[2] and decision.[3] To hold that payments not yet accrued may not be taken into account in figuring actual damage would reverse a fundamental principle of recovery in the law of contracts.

(2) Although § 77 obviously gives a lessor a claim for the rejection of his lease, the rule of the District Court in fact does not admit such a claim. The claim allowed is not for the destruction of the whole lease (for this damage "accrues," at the latest, upon rejection), but solely for the individual payments due and unpaid up to the time of final hearing. The importance of this distinction is clear. Subdivision (b) of § 77 provides that—

> "The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted."

If the right expressly given by this subdivision were availed of, a lessor might find his lease rejected at the very end of the proceedings; and then, by the District Court's rule, his claim for the rejection would be negligible, for payments accruing during the proceedings would have

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[2] *E.g.*, the copyright statute (17 U.S.C. § 25 (b)) where "actual damage" means "real" rather than "nominal." *J. E. Hendricks Co.* v. *Thomas Publishing Co.*, 242 Fed. 37 (C.C.A. 2). *Cf.* the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. § 20 (11)); *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97.

[3] *Addieg* v. *Tull*, 187 Fed. 101, 103; *McElwee* v. *Bridgeport Co.*, 54 Fed. 627, 629 (C.C.A. 5); *Shields* v. *Norton*, 143 Fed. 802, 804 (C.C.A. 2); *Hattiesburg Lumber Co.* v. *Herrick*, 212 Fed. 834, 847 (C.C.A. 5); *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734, 738 (C.C.A. 2); *Excelsior Motor Co.* v. *Sound Equipment, Inc.*, 73 F. (2d) 725, 728 (C.C.A. 7); and *Electrical Products Consolidated* v. *Sweet*, 83 F. (2d) 6, 9 (C.C.A. 10).

n paid by the trustees, and there would be little time a hearing on any further accruals. Such a rule is nly incompatible with the intent of the statute to give a or a claim for the damage caused by the rejection itself.

3) The damages in each case under this ruling are de- nined primarily by the length of the reorganization ceedings, a matter wholly unrelated to the lessor's ual loss. Protracted proceedings might give opportu- for a claim for ten years' rent, while a short reorgan- ion, planned to escape from burdensome leases, might trict claims to six months' payments. A measure of m so fortuitous and lacking in the constitutional re- rement of uniformity was surely not contemplated by gress.

4) Although § 77 deals with executory contracts and xpired leases in the same sentences and with the same ds, this rule establishes a measure for lease claims dif- nt from and in conflict with that recognized for execu- contract claims, not only under § 77—

*Annett* v. *N.Y., N.H. & H. R.R.*, 92 F. (2d) 428—

also under the old bankruptcy law.

*Central Trust Co.* v. *Chicago Auditorium Ass'n*, 240 U.S. 581.

The rule of the courts below, if approved, will necessarily end to claims under executory contracts as well, thus troying in large measure the provability of such claims. ere can be no doubt as to the measure of damages for ach of an executory contract; indeed, this Court has in ontract case reversed a ruling which assumed to limit amount recoverable on grounds strikingly similar to se suggested in the case at bar.

*Pierce* v. *Tenn. Coal &c. Railroad Co.*, 173 U.S. 1, 6, 14-16.

The ruling now in question, therefore, can be supported only on the assumption that Congress intended to render this common law claim for damages unprovable in great part, although the right to prove for such damages has always been recognized heretofore both in bankruptcy and in equity receiverships. An intent to make such a radical and unjust change in the law cannot be inferred.

The only other words in § 77 in which a limitation can possibly be implied are the phrase "determined in accordance with principles obtaining in equity proceedings." No court, however, has attributed to these words any limiting effect, and the District Judge dismissed them as immaterial here (R. 332-333). Obviously they could not refer to the technical rule applied in some equity receiverships that, in the absence of an indemnity covenant, a claim for rent falling due after the time for filing claims had expired could not be proved; for historical reasons the courts of several states refused to recognize that rejection of a lease gave rise to any claim whatsoever, which explains the rule referred to. Section 77, however, clearly validates such a claim and makes it provable.

It is nevertheless suggested in respondents' brief that the decision below may be supported on the general ground that future rent claims are speculative and therefore it would not be consistent with "principles obtaining in equity proceedings" to allow such claims to be proved. But this is obviously unsound. There has never been any difficulty about proving such claims either in equity cases or in bankruptcy, if the lease contained a proper covenant.[4]

*Wm. Filene's Sons Co.* v. *Weed*, 245 U.S. 597.
*Irving Trust Co.* v. *A. W. Perry, Inc.*, 293 U.S. 307.

[4] In some jurisdictions no special covenant is required. *Curran* v. *Smith-Zollinger Co.*, 18 Del. Ch. 220, 157 Atl. 432. *Minneapolis Baseball Co.* v. *City Bank*, 74 Minn. 98. *Leo* v. *Pearce Stores Co.*, 57 F. (2d) 340 (D.C. Mich.).

This reference to equity proceedings in § 77 appears rather to refer to exceptional cases involving punitive damages [5] or the presence of security,[6] in which equity might prescribe a different rule.

It is also urged in the respondents' brief that the one-year's rental limitation of § 63 (a) (9) of the Bankruptcy Act might be applied. But as the District Judge stated below (R. 332):

> "There is utterly nothing in the language of Sec. 77 to warrant such a construction. Indeed, there appears no more reason to construe Sec. 77 as adopting the limitation to one year's rent contained in Sec. 63, than to construe it as adopting the three years' limitation of Sec. 77B. On the contrary, when both in the amendment to Sec. 63 and in Sec. 77B Congress had adopted a limitation measured categorically in terms of the reserved rentals, the very fact that the limitation in Sec. 77 was expressed not at all in terms of rentals, indicates conclusively that a different measure was intended."

The opinion of the Circuit Court of Appeals in this case, as is pointed out in petitioner's brief, is confusing and does not reveal the reasoning upon which the District Judge was upheld. In Old Colony's case, however (now October Term, 1938, No. 325), the opinion indicates that the court, if not bound by its prior decision, might well have reached a different conclusion. Judge Hand said (98 F. (2d) 670, at p. 672):

> "Even if we were free, we should not have sustained the full extent of the plaintiff's claim: it is a fanciful notion that one may forecast the future value of a railroad half a century hence. We need not say

[5] *United States* v. *Bernard*, 202 Fed. 728, 732 (C.C.A. 9).
[6] *Merrill* v. *National Bank of Jacksonville*, 173 U.S. 131.

whether, if the matter were for the first time before the court as now constituted, a majority might have been disposed to allow future damages for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity. We affirm the ruling on this item."

This suggests that the court considered the speculative nature of estimates of rental value. The record in Old Colony's case, unlike the record in this case, contained a comprehensive offer of proof of statistical and other evidence upon the rental value of the property, which was rejected as a whole by the District Judge in accordance with his ruling.

But questions regarding the speculative character of such evidence, it is submitted, are in the realm of proof and not that of substantive law. Any claimant may fail to establish his case through insufficient evidence, but fear of that event is no ground for an unconditional limitation upon all claimants, such as the court below imposes. There are many cases where proof would readily suffice.[7] The statute should be applied so far as possible in accordance with its terms; further limitation is for Congress alone to fix.

## II.

### *Section 77, as Applied by the Courts Below, Contravenes the Fifth Amendment.*

The principle is fully stated in the recent decisions of this Court dealing with § 77B:

"In framing the reorganization statute Congress obviously attempted to award landlords an equitable

[7] For example, in *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, the rental value of the property was established by uncontroverted evidence for fourteen years into the future (p. 448).

share in the debtor's assets as, in justice, it was bound to do since the purpose was to discharge the debtor from liability to future suits based upon the lease."

*Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, at p. 453.

In the City Bank case it was said, of claims for rent to crue in the future under a rejected lease:

"Obviously if such obligations are to be discharged they must be made provable, for they cannot be destroyed" (299 U.S. at p. 439).

It is submitted that § 77, as construed and applied below the disaffirmance of a lease, destroys all obligation of e debtor lessee to make payments under the lease in the ture, without giving any provable claim to the lessor in turn, and therefore offends the constitutional guaranty f due process. The claim which is recognized by the lower urts is not related to the actual damage suffered from the ss of a lease; and its measure is variable, capricious and rbitrary, since the length of the reorganization determines s amount.

The Kuehner case approves the constitutionality of an niform restriction established by Congress. It is not uthority for the approval of a variable measure governed y immaterial events.

## Conclusion.

It is submitted that § 77 allows the lessor of a disaffirmed ease to prove against the reorganization estate a claim for he rent reserved in the lease for the remainder of the term ess the rental value of the leased property, both discounted o present worth; and the only limitation upon this claim

is that it be sufficiently established by proof. The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Counsel for HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as Trustees of the Property of Old Colony Railroad Company.

# PREME COURT OF THE UNITED STATES.

No. 63.—OCTOBER TERM, 1938.

onnecticut Railway and Lighting Company, Petitioner, vs. ward S. Palmer, James Lee Loomis nd Henry B. Sawyer, as Trustees f the Property of The New York, ew Haven and Hartford Railroad ompany, Debtor, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 3, 1939.]

Mr. Justice REED delivered the opinion of the Court.

his case poses the question of the correct measure of damages wable to a lessor creditor of a railroad debtor for the rejection lease under the reorganization provisions of Section 77 of the kruptcy Act. The determination depends upon the meaning of definitive clause "to the extent of the actual damage or injury rmined in accordance with principles obtaining in equity pro-lings."[1] Certiorari was granted, under Section 240a of the icial Code, because the case involves an important question of eral law which should be settled by this Court.

n December 19, 1906, the Connecticut Railway and Lighting mpany, petitioner here, leased certain gas, electric and street way properties for 999 years to the Consolidated Railway Com-y, predecessor of the New York, New Haven and Hartford Rail-d Company, hereinafter referred to as the New Haven. By bsequent assignment the New Haven was divested of everything ept the transportation properties involved here. On February 1910, these were transferred to a wholly-owned subsidiary of the w Haven. Some question arose in the reorganization proceed-s as to the New Haven's liability on the 1906 lease after this nsfer to its subsidiary. The lower court, however, held the New ven liable as lessee, and, no attack having been made upon this

[1] 49 Stat. 911, 914; 11 U. S. C. A. § 205(b).

ruling, we treat, without further consideration, the Connecticut Railway as a lessor and the New Haven as lessee.

The lease gave the lessor the option to terminate, on default of the lessee, and to repossess the property "without prejudice to its right of action for arrears of rent or breach of covenant." It contained no provision for liquidation of damages for breach of the entire lease.

The New Haven agreed to pay all taxes on the property and on the lessor's income from the property. It also paid $1,049,562.50 annually for the street railways. Of this amount, $504,975 was intended to provide for the payment of interest on the Connecticut Railway's bonds and for payments into a sinking fund. These interest and sinking fund payments created a claim upon the lessor for the contents of the fund at the date of payment of the bonds. The arrangement looked to the cancellation of the bonds in 1951 by the New Haven's payments, and the issuance by the Connecticut Railway of new bonds in their place. The delivery to it of these bonds, the New Haven agreed, would liquidate its claim for the contents of the sinking fund. In effect the annual reserved rent would then be considerably decreased, for the interest and sinking fund payments would be for its benefit as owner of the new bonds.

On October 23, 1935, the New Haven filed its petition under Section 77 of the Bankruptcy Act. The petition was approved and the respondents were appointed trustees. On December 18, 1935, they rejected the 1906 lease with the approval of the court. On November 16, 1936, the Connecticut Railway repossessed the street railway properties.

The Connecticut Railway filed claims against the New Haven's estate for numerous items, among them damages for breach of the lease and for deficiencies in property returned. It claims $23,190,314.73 as damages for rejection of the lease. This sum is alleged to be "the difference between the present worth of rent and of rental value for the balance of the term of the lease, liquidated by discounting at 4%."

The District Court held that under Section 77 the lessor is a creditor for actual damages accruing from the rejection of the unexpired lease to the latest practicable date in the reorganization for presentation of lessors' claims. Damages were measured by the difference between the rent reserved in the lease and the net earnings of the property. The court allowed the amount proved up to June

, 1937, with leave to the Connecticut Railway to apply for further earings to liquidate damages suffered after that date.

The Circuit Court of Appeals affirmed, approving the trial ourt's exclusion of any future damage which had not accrued up o the latest possible hearing in the proceedings.

*First.* The claim for deficiencies in the property returned to petitioner is not properly before this Court. The petition for certiorari did not include the claim among the questions presented or reasons for the issuance of the writ. It was listed as one of three rulings below. The first related to rent accrued to petition filed, the second to deficiencies in property returned, and the third to damages for rejection of the lease. Nowhere in the petition was there complaint as to the first two items. Clearly the petition sought review solely of the decree in so far as it limited petitioner's claim under Section 77 for damages from rejection of the unexpired lease. So clearly, certiorari was granted to review only the matter which this Court was advised aggrieved petitioner. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 177-9. Petitioner relies upon *Washington, V. & M. C. Co.* v. *National Labor Relations Board*, 301 U. S. 142, 146. Neither the language of that case nor the authorities there cited in support of the refusal to review a claim not mentioned give vitality to the suggestion of the petitioner that a mere reference in a petition for certiorari to a ruling, without a request for review, will cause its consideration.

*Second.* Under the Bankruptcy Act, prior to the amendment of Section 63(a) by the Act of June 7, 1934,[2] a claim for future

[2] 48 Stat. 923-924. "Sec. 4. (a) Section 63(a) of the Act of July 1, 1898, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended, is amended to read as follows: '(a) Debts of the bankrupt may be proved and allowed against his estate which are . . . . (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: *Provided*, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: *Provided further*, That the provisions of this clause (7) shall apply to estates pending at the time of the enactment of this amendatory Act.'"

The amendments of June 18, 1934, c. 580, 48 Stat. 991, June 5, 1936, c. 512, § 1, 49 Stat. 1475, and June 22, 1938, c. 575, Public No. 696, 75th Congress, 3d Session, are immaterial upon this point.

rent was not provable.[3] A covenant, however, creating a liability for damages on the filing of a petition in bankruptcy, measured by the difference between the present fair value of the remaining rent and the present fair rental value of the premises for the balance of the term, resulted in a provable claim.[4] This condition made for inequality among both creditors and bankrupts, since recovery by claimants depended upon the artistry with which their leases were drafted and discharged bankrupts were often left with surviving claims for rent, unduly burdensome upon their efforts at self-rehabilitation.[5] Everyone interested in bankruptcy problems had long been familiar with the future rent situation and its ramifications into the fields of anticipatory breach of executory contracts and the provability of contingent claims.[6]

During the years 1933 to 1935 the Congress dealt on several occasions with landlords' claims for future rent. The Act of March 3, 1933, made provision for the relief of individual debtors, agricultural and non-agricultural, and for railroad reorganization. Section 74 defined creditors thus: "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. A claim for future rent shall constitute a provable debt and shall be liquidated under section 63(b) of this Act."[7] Similarly the railroad reorganization section treated of future rents in subsections 77(b), (h) and (j), hereafter more fully considered. By the decision of *Manhattan Properties* v. *Irving Trust Company*, on January 10, 1934, the difficulties of lessors were sharply emphasized. The Act of June 7, 1934, supplied procedure for corporate reorganization with arrangements permitting the proof of claims for future rent.[8] These provisions have been upheld.[9]

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[3] Manhattan Prop. v. Irving Trust Co., 291 U. S. 320, 330.

[4] Irving Trust Co. v. Perry Co., 293 U. S. 307, 310.

[5] City Bank Co. v. Irving Trust Co., 299 U. S. 433, 437.

[6] Cf. Manhattan Prop. v. Irving Trust Co., *supra*; Maynard v. Elliott, 283 U. S. 273, 276; Central Trust Co. v. Chicago Auditorium Assn., 240 U. S. 581, 589-90.

[7] 47 Stat. 1467-68.

[8] "In case an executory contract or unexpired lease of real estate shall be rejected . . . any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated

first provisions for proof of claims for future rent in rail-reorganizations appeared in the Act of March 3, 1933, simultaneously with the broadening of the Bankruptcy Act to include the roads as debtors. This act included Section 74 which enlarged bankruptcy definition of creditor. For creditors of this type railroad reorganizations, the enactment was equally broad.[10] The legislative history discloses nothing as to the motives which adopted the inclusion of the language. In the Act of August 27, 1935, these clauses were amended to read as they now stand but again nothing has been found commenting upon the reasons for their adoption in either the original or present form. Changes of interest from the 1933 language were proposed by the Federal Coordinator of Transportation,[11] but they were not deemed of sufficient

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claim ranking on a parity with debts which would be provable under sec. 63(a) of this Act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of entry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: *Provided*, That the court shall scrutinize the circumstances of an assignment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder." 48 Stat. 915.

"(h) Upon final confirmation of the plan, . . . . the property dealt with by the plan, when transferred and conveyed by the trustee or trustees to the debtor or the other corporation or corporations . . . shall be free and clear of all claims of the debtor, its stockholders and creditors . . ." 48 Stat. 920.

[9] City Bank Co. v. Irving Trust Co., 299 U. S. 433; Kuehner v. Irving Trust Co., 299 U. S. 445.

[10] 47 Stat. 1475, 1480, Sec. 77, "(b) . . . The term 'creditors' shall, . . . include . . . all holders of claims, interests, or securities of whatever character against the debtor or its property, including claim for future rent, whether or not such claims, interests, or securities would otherwise constitute provable claims under this Act."

"(h) . . . The confirmation of the plan shall discharge the debtor from all debts except as provided in the plan. . . ."

"(j) Upon the confirmation of the plan the property dealt with by the plan, . . . shall, as the court may direct, be free and clear of all claims of the debtor, its stockholders and creditors, . . ."

[11] House Document No. 89, 74th Congress, 1st Session, Appendix X, page 231.

These affecting the language of the Act of March 3, 1933, quoted in note 10, *supra*, were as follows:

"The term 'creditors' shall include for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease." *Id.* p. 231.

"In case an executory contract or unexpired lease of property shall be rejected . . . , any person injured by such nonadoption or rejection, shall, for all purposes of this section be deemed to be a creditor to the extent of such damage or injury, provided, that the judge shall consider the circumstances of an assignment of future rent claims and the amount of considera-

importance by him to merit particular comment. The Committee on the Judiciary of the House of Representatives held hearings and reported a bill, based on the Coordinator's draft, with the language, here important, changed to the exact wording of the Act of August 27, 1935. Nothing which illumines this problem appears in the hearings[12] or committee report.[13]

The portions of the act which we must consider are as follows:

"Sec. 77. Reorganization of railroads . . . (b) . . . The term 'creditors' shall include . . . the holder of a claim under a contract executory in whole or in part including an unexpired lease.

" . . . In case an executory contract or unexpired lease of property shall be rejected . . . any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. . . .

"(f) . . . The property dealt with by the plan, when transferred and conveyed . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, . . ." 49 Stat. 911, 920.

It is first to be noted that the successive acts of the Congress, on extension of individual debts and corporate and railroad reorganization, are directed generally at the rehabilitation of debtors.[14] As one of the means used consistently to accomplish this, claims for future rent are made provable and dischargeable, so that the debtor would not be burdened with the rent obligation after discharge.[15] Next, the limitation of the amount of future rent recoverable to one year in Section 4 and to three years in Section I[77B(b)] of the Act of June 7, 1934, leaves no doubt that the

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tion paid for such assignment in determining the amount of damages allowed an assignee hereunder and may limit such damages to the actual consideration paid for such claims." *Id.* pp. 231-2.

" . . . the property dealt with by the plan, when transferred and conveyed . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, . . . The final decree shall discharge the debtor from its debts and liabilities and shall terminate all rights and interests of its stockholders and creditors except as provided in the plan or as may be reserved as aforesaid." *Id.* p. 229.

Comment of Coordinator, *Id.* p. 100 *et seq.*

12 Hearings before the Committee on the Judiciary on H. R. 6249, 74th Congress, 1st Session.

13 H. R. Report No. 1283, 74th Congress, 1st Session.

14 Cf. Adair v. Bank of America Nat. Trust and Savings Ass'n., 303 U. S. 350.

15 Cf. Manhattan Prop. v. Irving Trust Co., 291 U. S. 320, 331-2.

ngress deemed a definite formula advantageous in bankruptcy
l general corporate reorganization. Its failure to provide an
ct measure in railroad reorganizations shows it was not there
sidered appropriate. Finally, it seems obvious that the changes
the Committee on the Judiciary in the wording of the Coordina-
r's draft, by which "actual" was inserted before "damage" and
determined in accordance with principles obtaining in equitable
roceedings" added as a guide, were intended to call emphatically
the attention of those administering the reorganization section
e requirement that only those damages susceptible of definite
roof should be allowed. We cannot read a limitation on damages
to the language as enacted. As reorganizations had been tradi-
nally carried on in equity and would be carried on in a bank-
ptcy court with equity powers, it was natural to add the clause
to equitable proceedings. Leases were placed upon the same
sis as executory contracts.

The New Haven urges that the reference to "equitable proceed-
gs" is to receiverships in equity, as such receiverships were men-
ned twice in the same subsection. The use of "equitable pro-
edings" instead of "equity receiverships" supports the view that
mething different was intended. The equitable principle for the
llowance of claims for future rent the New Haven finds in *Penn-
lvania Steel Company* v. *New York City Railway Company*, 198
d. 721, expressed as follows, pages 741-742,

Claims which when presented within the time limited by the court
r their presentation are certain or are capable of being made
rtain by recognized methods of computation, should be allowed.
laims which are not then certain should be disallowed because they
ford no basis for making dividends."

he conclusion of the District Court, as affirmed by the Circuit
ourt of Appeals, is then offered as the correct rule in this case.
hat conclusion was summarized by the brief of the New Haven in
hese words:

"The court thereupon held that damages measured by the differ-
nce between the rent reserved and the earnings of the property up
o the date of hearing should be allowed, with the further right to
he claimant, in common with all other claimants under rejected
eases, to apply for a subsequent hearing at the latest practicable
date to be determined by the court during the reorganization pro-
eedings for the purpose of proving similar damages up to that
date."

Damages for loss of rent which fell due after the latest practicable date for filing claims were thus barred from proof, and under the quoted language of subdivision (f), the right to recover for such injury from the debtor after reorganization was destroyed.

We are of the opinion that this construction of the statutory provisions for the measurement of damages for loss of future rent is erroneous. Notwithstanding its extended term, the lease created an obligation under the present Bankruptcy Act upon the New Haven entitled to share in its assets upon reorganization on an equality with the claims of other creditors.

While it could be said that the general rule in equity receiverships was that only accrued damages could be proven, there was no discernible equitable rule for the determination of damages for rejection or nonadoption of an unexpired lease. The actual damages from the breach were not determined. At the most an arbitrary time limit was set on proof. The reference to equity proceedings does not, in our opinion, refer to any rule for the measure of damages in equity receiverships. In their administration of estates, whether railroad or non-railroad, claims for future rents depended for their provability upon the fact of reentry,[16] the existence of a clause for indemnity in case of breach,[17] or the incidence of the maturity of the rent claim under the local law.[18]

The damages recovered by an injured party have always been limited to his "actual" damages. There is nothing to indicate that the Congress intended to have "actual" interpreted as "accrued." The measure of damages applied by the courts for the breach of a lease, where damages are permitted, is uniform. In *William Filene's Sons Co.* v. *Weed*[19] and in *Kuehner* v. *Irving Trust Co.*,[20] this Court said in analagous situations that the measure was the present value of the rent reserved less the present rental value of the remainder of the term.[21] The English Bankruptcy

[16] Gardiner v. Butler & Co., 245 U. S. 603, 605.

[17] Wm. Filene's Sons Co. v. Weed, 245 U. S. 597, 602.

[18] Gardiner v. Butler & Co., 245 U. S. 603, 605; Wake Development Co. v. Auburn-Fuller Co., 71 F. (2d) 702; Moore v. McDuffie, 71 F. (2d) 729; In re McAllister-Mahler Co., 46 F. (2d) 91; see Gerdes, Corporate Reorganizations, Secs. 667-86.

[19] 245 U. S. 597, 602.

[20] 299 U. S. 445, 450.

[21] Cf. Grayson v. Mixon, 176 Ark. 1123; Carran v. Smith-Zollinger Co., 13 Del. Ch. 290; Wilson v. Nat. Refining Co., 126 Kan. 139; Womble v. Leigh, 195 N. C. 262; In re Reading Iron Works, 150 Pa. 369; Sutherland, Damages, Vol. III, Fourth Ed., Section 844.

t permits proof of future rents, as any claim is provable which "as to mode of valuation, capable of being ascertained by fixed ules or as matter of opinion."[32] The measure of damages is the me.[33] The difficulties of proof are well recognized.[34] The same ules apply to executory contracts. In *Kushner* v. *Irving Trust* ,[35] this Court pointed out as one of the reasons for upholding the alidity of a statutory formula the uncertainty as to the loss en-ailed by abrogation of leases, an uncertainty growing greater as he remainder of the term lengthens. "Testimony as to present ental value," it was said, "partakes largely of the character f prophecy . . . ." A remainder of fourteen years was there nvolved. Here there is a remainder of 969 years. That lease was or a store in the City of New York. Evidence of the value of un-expired terms of street railway leases would be even more difficult o produce, as possible lessees are limited in number. Since insol-vencies are more frequent in economic depressions and since, as a consequence, estimates of the rental value of the remainder of the term are given under subnormal business conditions, the diffi-culties are multiplied.

Judges in equitable proceedings will have the advantage of evi-dence in applying the usual rules as to the measure of damages. It is well understood that such evidence must show damages to reasonable certainty. Mere "plausible anticipation" does not merit consideration nor are flights into the realm of pure speculation en-titled to be treated as evidence.[36] The determination of the amount to be allowed as the damage will be based on evidence which satis-fies the mind.

*Third.* We comment briefly on two other points raised. The betterments and sinking funds having come into the possession of the lessors by the terms of the lease are not to be considered as offsets against the claim of the lessor. Their possession by the lessor increases the earning power of the assets to the benefit of the lessee.

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[32] Act of 1914, 4 and 5 Geo. V, c. 59, sec. 30(8)(c).

[33] In re Tiddle, 3 Morr. 196; Ex parte Llynvi Coal and Iron Co., L. R. 7 Ch. App. 28; In re Hinks, Ex parte Verdi, 3 Morr. 218; In re Carruthers, 1 Mac. 173; cf. Hardy v. Fothergill, L. R. 13 A. C. 358, where a claim on account to deliver well repaired at end of fifty-year term was held provable.

[34] Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 725.

[35] 250 U. S. 445, 454.

[36] Cf. Sutherland, Damages, Vol. I, Fourth Ed., Section 121.

Since subsection (1) of Section 77[37] is general in form and is specifically subordinated to the other provisions of the section, including subsection (b), Section 60 (a) (2) of the Bankruptcy Act is inapplicable to the present controversy.

As certiorari was sought and allowed only upon so much of the order of the Circuit Court of Appeals as affected the measure of the lessor's damage for rejection of the lease in question, the order of that court is reversed only in that particular and this case is remanded to the District Court for further proceedings in accordance with the order and opinion of the Circuit Court of Appeals as herein modified and of this Court.

*It is so ordered.*

Mr. Justice McREYNOLDS is of opinion that the judgment of the court below should be affirmed.

Mr. Justice BRANDEIS took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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[37] 49 Stat. 922, "(1) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."